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No. 06-139

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SAFWAT H. SHAKIR, PETITIONER

v.

PRAIRIE VIEW A&M UNIVERSITY; TEXAS A&M UNIVERSITY SYSTEM; STATE OF TEXAS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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Prairie View A & M University ("University") is unable to dispute, in *any* fair fashion, the salient qualifications difference between Shakir and Keys, the candidate ultimately selected to fill the agronomist position. Nor can the University legitimately dispute the injustice perpetrated by the effect of employing the "clearly better qualified" standard in this case. If anything, ignoring the falsity of the disparity in the qualifications evidence, permissible by way of the "clearly better qualified" standard, sets a difficult bar for plaintiffs to overcome and deeply masks the pretextual nature of the numerical ranking administered by the University that resulted in a low ranking of Shakir.

The University's opposition is tantamount to parsing of words in an attempt to explain away the genuine conflict created by the variety of undefined standards employed by the circuit courts. *Shakir* warrants review because every employer in this country on any given day evaluates and compares candidates for a job, whether in form or substance, on the basis of the qualification parameters prescribed by the employers. Yet, today, the Fifth Circuit and most other circuits would leave out the comparative qualifications analysis from the pretext consideration under the *McDonnell Douglas* paradigm, unless a plaintiff is able to demonstrate that he or she is a "clearly better qualified" candidate, however that standard is defined and applied by each court. Such evidentiary burden is unfair to the aggrieved and far too heavy to be permissible under the Title VII framework of law enacted by Congress. *Reeves* unequivocally and simply recognized that a defendant's explanation for any employment practice which is "unworthy of credence" is "one form of circumstantial evidence that is probative of intentional discrimination." The "clearly better qualified" or a similar standard is an untenable barrier to fulfilling the inquiries prescribed by *Reeves*.

The logic behind the judicial policy of the "clearly better qualified" standard, initiated by the Fifth Circuit in *Deines*, is based on the rationale that the comparison of candidates for jobs should be left to the judgment of the businessman or that it should not be in the province of either the court or the jury. While such practice has well intended justifications, the logic behind the practice is fundamentally flawed and defies common sense because any employment decision-making process that leaves the judgment entirely up to the businessman can be explained by the employer as being made for a nondiscriminatory reason at any time, justified or not. Therefore, such explanation should be subject to the pretext analysis as contemplated by *Reeves*. In that regard, *Deines* is logically inconsistent with *Reeves* because by imposing a heightened "clearly better qualified" standard, the former prohibits the pretext analysis of a significant part of the employer's decision-making process, leaving a void, while the latter holds in an all-encompassing way that a reasonable factfinder may consider any direct or circumstantial evidence in rejecting the employer's nondiscriminatory reason for its decision.

Moreover, because of the existing logical inconsistency, the very wisdom of not challenging the businessman's latitude in making personnel decisions in the context of the pretext analysis must be seriously debated. As the law currently stands, the mythical "businessman" has the option and the power to "do the right thing" or to abuse his power unlawfully in making his employment decisions. A decision for hiring or promotion of candidates based on their comparative qualifications in the hands of a businessman is no more and no less susceptible to pretext and masking than any other reason an employer may provide to explain the employment decision and therefore, not immune from unlawful discrimination in violation of Title VII.

In this case, the numerical ranking administered by the University based on the comparative qualifications among the candidates was pretextual in and of itself and

undermined the employer's nondiscriminatory explanation. The resulting anomalies in the ranking were sufficient to demonstrate the falsity of the University's explanation as to why Shakir ranked far below the selected candidate. Therefore, the ranking process alone provided the requisite proof of falsity under *Reeves* for summary judgment purposes, without the unnecessary imposition of the heightened "clearly better qualified" standard that created an impermissible evidentiary barrier for Shakir. The University has failed to demonstrably justify any underlying logic or articulate a reason for this heightened evidentiary barrier and explain why it should not be demolished other than because most circuits follow this questionable standard.[1]

I. REVIEW IS NECESSARY BECAUSE THE CIRCUITS ARE IN VARYING DEGREES OF CONFLICT

a. THE COURT'S *ASH V. TYSON* DECISION IS NOT MERELY CONFORMING TO A TECHNICALITY

Contrary to the University's argument, a failure to follow *Ash* is not harmless error because conforming to that decision is not merely a metaphor or a technical formality. Opp. Br. 21. *Ash* expressly stated that "qualification evidence may suffice, at least in some circumstances, to show pretext." 126 S. Ct. at 1197 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88, 109 S. Ct. 2363, 105 L.Ed.2d 132 (1989)). However, the University acknowledged that several circuit decisions *post-Ash* did not disturb the *pre-Ash* decisions in varying degrees of "superior," "significantly better qualified" or such similarly heightened standards. The continued application of the varying standards invites

[1] In the event that the Court does not grant certiorari in this case, Shakir respectfully requests that the Court vacate the decision below and remand the case with specific instructions to the Fifth Circuit to review the pretext standard in light of the Supreme Court's holding in *Ash*.

inconsistent results and warrants this Court's intervention at this time to avoid further anarchy in this area of law. *See* Opp. Br. 22.

b. CERTIORARI IS NEEDED TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEAL AND BECAUSE THE ISSUE IS IMPORTANT AND RECURRING

i. Differing Standards in Other Courts of Appeal

The fundamental question that begs this Court's attention is whether the comparative qualifications evidence alone may show pretext for the purpose of the *McDonnell Douglas* paradigm.[2] The nature of the problems posed in the area of the comparative qualifications evidence among the circuits is multi-faceted: (1) the definitions of "clearly superior," "clearly better qualified," "significantly better qualified" or similar standards employed by the circuits do not provide the requisite clarity and obscure the real underlying issues; (2) the subjective and objective factors frequently used in the analysis are shifting without a solid anchoring basis; and (3) inconsistent results abound in the attempts at resolving the question of whether the comparative qualifications evidence *alone* is enough to show pretext for intentional discrimination. With regard to the last issue, the irreconcilable complexity of stances taken by the courts of appeals is demonstrated by the Eleventh Circuit which apparently adopted the "jump off the page and slap you in the face" standard prior to this Court's decision in *Ash* but still

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[2] Shakir's position has always been that he has established his prima facie case and provided the circumstantial evidence showing that the employer's explanation for his non-selection was pretext. Thus, he has not relied solely on the comparative qualifications evidence to show pretext.

agrees with the Ninth Circuit's position that qualification evidence alone is sufficient for pretext determination.[3]

Moreover, given the absence of unanimity among the circuits on the treatment of the comparative qualifications evidence, even the University may concede that, at a minimum, the Third, Eight, and Ninth[4] Circuits have each applied a different standard that is less strict than the "clearly better qualified" standard employed by some of the other circuits. While this Court in *Ash* did not expressly disapprove of the various standards applied by the circuits, nonetheless, the Court noted the existence of "various other standards," and stated that "[i]t suffices to say here that some formulation than other than the test the Court of Appeals articulated in this case would better ensure that trial courts reach consistent results." 126 S. Ct. at 1198. Even a solid effort to comply with *Ash* appears to end in a struggle to balance the competing interests.[5] However, perhaps all that should be necessary for the plaintiff to show pretext is to produce "the evidence [that] must be of sufficient significance itself to call into question the honesty of the employer's explanation." *Bender,* 455 F.3d at 627. Such evidentiary standard appears to suggest compliance with the requirements of *Reeves*.

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[3] *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004) (noting that pretext can be shown by comparing qualifications only when the disparity is "so apparent" by using the "jump off the page and slap you in the face").

[4] *Raad v. Fairbanks North Star Borough School Dist.*, 323 F.3d 1185 (9th Cir. 2003) (holding that qualification evidence standing alone may establish pretext where the plaintiff's qualifications are "clearly superior" to those of the selected job applicant); *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1033 (9th Cir. 2006) (citing *Ash* for the proposition that qualification evidence may alone suffice to show pretext); the Third Circuit had not developed a standard.

[5] *See Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 626-28 (6th Cir. 2006).

Consistent with *Reeves*, the facts in *Shakir* permit a reasonable factfinder to question the honesty of the employer's explanation and strongly suggest that the University's use of the comparative qualifications evidence was a pretext for unlawful discrimination. The pretext is evident in (1) the ranking process itself, which appeared to have circumvented the conventional comparison of qualifications; (2) the anomalies in the "review" of the top candidates; (3) the single-race composition of the selection committee; (4) the process of the ultimate selection of the candidate, including whether the decision was made by the chair of the selection committee alone or with the participation of the other members; and (5) other factors that suggest inconsistencies in the University's selection process. The businessman's judgment should be at the very heart of the pretext inquiry and evidentiary considerations, which are no less susceptible to intentional discrimination than any other consideration or method used by the employer to make its employment decisions.

On any given day, every employer selects from a pool of candidates a person for a job on the basis of ostensibly honest evaluation of the candidates' relative qualifications. Such employer evaluations should not enjoy a special protection from the inquiry into the truthfulness or the falsity of the employer's explanation than the reasons for any other employment decision an employer makes. Therefore, this case has important ramifications for all employers, including the nation's colleges and universities.

ii. The Heightened Evidentiary Standard Is Inconsistent with *Reeves*

The University's position that "*Reeves* do not come into a play until the plaintiff has already shown sufficient

evidence of pretext (and a prima facie[6] case)" is simply a misconstruction of *Reeves* and a misunderstanding of the role of pretext evidence in the *McDonnell Douglas* burden shifting analysis. *See* Opp. Br. 20. In connection with the *McDonnell Douglas* paradigm, qualifications evidence is relevant for *any* purpose of demonstrating whether sufficient evidence of pretext exists for summary judgment purpose, **not after** the plaintiff has already shown evidence of pretext, as the University claims. Thus, according to *Reeves*, any direct or circumstantial evidence of pretext, including the qualifications evidence that is sufficient to show pretext, combined with the prima facie case, without regard to the barrier of the "clearly better qualified " standard, is enough to defeat summary judgment. The very point of considering the qualifications evidence for pretext analysis without being confronted with the high hurdle of the "clearly better qualified" standard is at stake here. Most circuits today that employ the heightened qualifications standard for finding of pretext leave out significant evidence of pretext from being considered by the jury and the court. Such practice is unfair, illogical, inconsistent with *Reeves* and, therefore, should be discontinued.

In cases like *Shakir*, by ignoring the comparative qualifications evidence as a pretext for unlawful discrimination under the *McDonnell Douglas* analysis, a vital part of the evidence is overlooked. Thus, the University, while touting its facially neutral ranking process, produced a result that had a devastating impact upon an employee's selection. More importantly, the University's selection process masked serious flaws in its ranking process and permitted it to consider inconsistent qualification factors in its decision. The University is unable to answer how it selected the candidate who had barely five years of experience, had not published any scholarly papers, had

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[6] As noted by the District Court, the parties do not dispute the fact that Shakir has made his prima facie case. Pet. App. 19a-20a.

never taken a leadership role in research, had no research experience for more than twelve years prior to his selection, and had no other significant, demonstrable experience or accomplishment. The University cannot explain or justify the fact that the selected candidate was ranked so much higher than Shakir, a candidate who has more than three times the number of years of research experience than Keys, has published a book and a number of scholarly articles, lectured worldwide, served as a director of the NASA-supported research group and had many other relevant experiences and achievements.

The "clearly better qualified" standard excluded Shakir's pretext evidence involving other unexplainable anomalies in the selection process as well which should have been considered under *Reeves*. Such evidence included the ranking of Shakir's former research assistant higher than Shakir, the ranking of the knowingly unavailable candidates near the top, and the willful ignorance by the selection committee of the fact that the ultimately selected candidate, Keys, doctored his otherwise weak and dubious resume in an attempt to bolster his accomplishments by mimicking some of Shakir's credentials, such as his work with NASA. Additional factors that should have been considered for pretext analysis included the review and ranking of Keys' candidacy after all other candidates have already been ranked, even setting aside the issue of whether a deadline for the position existed or had already passed, and the single-race composition of the selection committee favorable to the chosen candidate, although that in and of itself is not a conclusive factor in determining the pretextual nature of the University's proffered reason for the non-selection of Shakir.

II. THE FIFTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH *DESERT PALACE*

The University has openly overlooked the obvious argument posited by Shakir that the Fifth Circuit, as noted in

his petition, continues to follow the pre-*Desert Palace* pattern of decisions—that only direct evidence is accepted in determining whether a discriminatory animus exists for mixed motive analysis purposes. *See* Opp. Br. 22-24. This pattern is evident by comparing the Fifth Circuit's pre-*Desert Palace* to the post- *Desert Palace* decisions. *See e.g., Bienkowski v. American Air Lines*, Inc., 851 F.2d 1503, 1506-07 (5th Cir. 1998), and *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004). Such comparison demonstrates that the Fifth Circuit has not changed in any way from the pre-*Desert Palace* days of considering only the direct evidence of discriminatory animus in the mixed motive analysis. Unfortunately, this pattern of rejecting the holding in *Desert Palace* is common and pervasive in other circuits as well. *See* Pet. 20. For that reason alone, this Court should intervene to reiterate and stress again the significance of the Civil Rights Act of 1991[7] and *Desert Palace*.

Thus, despite the University's arguments to the contrary, the Fifth Circuit in *Shakir* failed to consider for the purpose of the mixed-motive analysis the obvious circumstantial evidence that the protected characteristic was a motivating factor in the employer's decision, considering that (1) the employer is a historically predominantly black university; (2) the composition of the selection committee consisted of only black members; and (3) plaintiff's ranking was substantially lower than that of the other applicants who have significantly less research experience and scholarship than he, even ranking lower than his black post-doctoral assistant; and (4) the prima facie case was disregarded. By adducing the forgoing evidence of a motivating factor, it is clear that Shakir has affirmatively established that the University engaged in "an unlawful employment practice." However, the Fifth Circuit completely ignored this evidence.

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[7] 42 U.S.C. § 2000e-2(m).

While ignoring the circumstantial evidence of the discriminatory animus under the *McDonnell Douglas* framework as prescribed by *Reeves*, the Fifth Circuit also rejected Shakir's mixed-motive argument on the basis that he did not produce evidence of any discriminatory comments—in effect, requiring direct evidence of racial animus. Under *Desert Palace*, the court should have considered Shakir's circumstantial evidence of the candidates' comparative qualifications as well as his protected characteristic to determine whether race was a motivating factor in the University's decision.

III. REVIEW IS ALSO WARRANTED BECAUSE THE FIFTH CIRCUIT MISAPPLIED THE SUMMARY JUDGMENT STANDARD

The University is overlooking the salient fact here: a rational employer would not have selected for a researcher's position at a University a candidate whose relevant experience was one-third that of another, who had published no scholarly articles or books, and had no substantial experience in research leadership.

CONCLUSION

This Court is the Court of last resort. Petitioner Shakir was wronged by the lower courts' decisions. Shakir respectfully requests that the Court grant review of his petition for writ of certiorari.

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